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Supreme Court of the United States

OCTOBER TERM, 1961

No. 598

DRAKE BAKERIES INCORPORATED,

Petitioner,

against

LOCAL 50, AMERICAN BAKERY & CONFECTIONERY WORKERS INTERNATIONAL AFL-CIO, and LOUIS GENUTH, Secretary-Treasurer, LOCAL 50, AMERICAN BAKERY & CONFECTIONERY WORKERS INTERNATIONAL, AFL-CIO,

Respondents.

REPLY BRIEF FOR PETITIONER

This brief is submitted in reply to respondents' brief herein and the amicus curiae brief of the New York State AFL-CIO.

ARGUMENT

I

Respondents' arguments on the merits go to the question of arbitrability of the dispute and hence must be determined by the courts after a trial.

In their brief, respondents spend a great deal of time in discussing the merits of the instant case. Respondents

argue (1) that Drake was wrong in the grievance that eventually led to the breach of the no-strike clause in question; (2) that the Union was not to blame for the strike on January 2, 1960; and (3) what happened on January 2, 1960 was not a strike within the meaning of the no-strike clause.

We will briefly discuss the merits of respondents' contentions but we submit that this is not the question before this Court. In petitioner's main brief, we contended (a) that a breach of a no-strike clause is so inconsistent with the grievance and arbitration procedure that a breaching union cannot thereafter use the grievance and arbitration machinery to prevent judicial redress for that very violation; and (b) that the arbitration clause does not cover breaches of the no-strike clause. If these positions are correct, then the question of whether or not there was in fact a breach of the no-strike clause, becomes determinative of whether or not the dispute is arbitrable. If there had in fact been such a breach, then the Union had waived its right to arbitrate or the dispute was not within the scope of the arbitration clause herein. In either event, it is not arbitrable. Likewise, if there had not been a breach of the no-strike clause in fact, then the dispute would be arbitrable.

As held by this Court in *United Steelworkers* v. *Warrior & Gulf Navigation Co.*, 363 U. S. 574, 582 (1960) all questions of arbitrability remain one for the courts, rather than for the arbitrators to determine. Accordingly, the merits of this dispute must be reserved for the courts to determine in a full trial on the merits.

The fact that the merits of a no-strike clause is for the courts, rather than for the arbitrators, was specifically found by the 6th Circuit in *International Union, United Automobile* v. *Benton Harbor Malleable Industries,*

Inc., 242 F. 2nd 536, 539-540 (6th Cir.), *cert. denied*, 355 U. S. 814 (1957):

> "We are of the opinion that the question of whether an issue is an arbitrable one under a contract of arbitration is a legal question for the Court rather than for the arbitrator in the absence of a contract giving the arbitrator such jurisdiction." Specifically quoted and followed in *Structural Steel & Ornamental Iron Association* v. *Shopmen Local Union No. 545*, 172 F. Supp. 354, 358 (D.N.J. 1959).

Again, in *Lodge No. 12* v. *Cameron Iron Works*, 257 F. 2d 467, 470 (5th Cir.), *cert. denied*, 358 U. S. 880 (1958), the Court of Appeals for the Fifth Circuit stated:

> "* * * the courts have, with practical uniformity, held a question of arbitrability to be an issue for the courts—that is the courts decide if the particular grievance is arbitrable under the terms of the collective bargaining contract. This is true even where the contract specifies that *any* controversy relating to the meaning or interpretation or application of the contract is arbitrable."

To the same effect, see e.g.:

> *Brass & Copper Workers Union* v. *American Brass Co.*, 272 F. 2d 849, 853 (7th Cir., 1959), *cert. denied*, 363 U. S. 849 (1960);
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> *Engineers Association* v. *Sperry Gyroscope Co.*, 251 F. 2d 133, 137 (2nd Cir. 1957);
>
> *Local No. 149* v. *General Electric Co.*, 250 F. 2d 922, 927 (1st Cir. 1957), *cert. denied*, 356 U. S. 938 (1958).

The wisdom of this rule is clearly shown by the posture of the instant case. Thus, respondents have on the one

hand contended that the dispute is complex and interwoven into the entire fabric of the relationship between the union and the employer. Yet on the other hand, it is asking the courts to determine whether or not there was a breach, either on the union's denials or, at best, by weighing the conflicting affidavits of the parties. Questions of fact, on which there is such disagreement between the parties, just cannot be resolved by affidavits and affidavits are the only things that are before the courts here. The merits of the dispute, therefore, must be reserved for a full trial.

In its brief respondents spend a considerable time in discussing the merits, not only of the strike, but of the underlying grievance which led to the strike, namely, whether or not Drake had the right to schedule production for Saturday, December 26, 1959 and Saturday, January 2, 1960. In this they wax eloquent about the union members' need for a 3-day weekend and say nothing about the company's competitive need to make and sell fresh products. But again the issue before this Court is not whether Drake's competitive disadvantage in having to sell stale cake outweighed their employees' desires for a 3-day weekend. The issue is whether or not there is judicial redress for the breach of a no-strike clause.

It is particularly inappropriate to consider the question of whether or not the Union's original grievance had merit. Mr. John Mollenhauer, the Plant Manager of Drake, submitted an affidavit to the Court below in which he pointed out that Drake had the unquestioned right to schedule production on the Saturdays in question, both as an inherent management prerogative, and by virtue of the specific language of the contract. Further, the Union itself recognized this when it attempted but failed during

the course of the bargaining to have included in the contract specific prohibition against Saturday work (R 12-14).

But whether or not Drake had the right to schedule production on these Saturdays is wholly irrelevant. That question could have been raised by the Union only through the grievance and arbitration provisions of the contract which was established as the exclusive method of resolving such issues. Instead, the Union relied on its own economic power. When it chose to utilize self help, it thereby breached the no-strike clause regardless of the merits of Drake's contention that it had the right to reschedule production.

An abundance of authority holds that the merits of the dispute which led a union to breach a no-strike clause is irrelevant to determine whether or not there had been a breach of that clause. To do otherwise would destroy the fundamental means of settling the inevitable disputes which arise under any collective bargaining agreement and substitute instead the anarchy of resort to self help, or in the words of this Court in *United Steelworkers* v. *Warrior & Gulf Navigation Co.*, 363 U. S. 574, 580 (1960) instead of having the labor-management "relationship governed by an agreed upon rule of law", it would leave "each and every matter subject to a temporary resolution dependent solely on the relative strength, at any given moment of the contending forces."

Thus, the late Dean Harry Shulman, one of the country's outstanding labor authorities, stated in *Ford Motor Co.*, 3 L. A. 779, 780-781 (1944):

> "Some men apparently think that, when a violation of contract seems clear, the employee may refuse to obey and thus resort to self-help rather than the grievance procedure. That is an erroneous

> point of view. In the first place, what appears to one party to be a clear violation may not seem so at all to other party. Neither party can be the final judge as to whether the contract has been violated. The determination of that issue rests in collective negotiation through the grievance procedure. But, in the second place, and more important, the grievance procedure is prescribed in the contract precisely because the parties anticipated that there would be claims of violations which would require adjustment. That procedure is prescribed for all grievances, not merely for doubtful ones. Nothing in the contract even suggests the idea that only doubtful violations need be processed through the grievance procedure and that clear violations can be resisted through individual self-help. The only difference between a 'clear' violation and a 'doubtful' one is that the former makes a clear grievance and the latter a doubtful one. But both must be handled in the regular prescribed manner."

This was specifically held by the Second Circuit in *Shirley-Herman Co.* v. *International Hod Carriers*, 182 F. 2d 806 (2d Cir. 1950). In that case, a 301 action brought for breach of a no-strike clause, the lower court refused to admit testimony concerning the merits of the dispute which led to the work stoppage there in question. The Court sustained that ruling of the lower court in the following language, at page 810:

> "But the court correctly limited the issue before the jury to the single question whether the union had caused a 'cessation of work' without going to arbitration. The merits of the dispute were of no moment, since the union had promised that regardless of the nature of a dispute which might arise, it would not cease work but would keep on the job

> until the dispute was settled by the machinery provided for in the contract. This, as the jury found, the union had not done."

To the same effect: *International Union, United Automobile* v. *Benton Harbor Malleable Industries*, 242 F. 2d 536, 540-541 (6th Cir.), *cert. denied*, 355 U. S. 814 (1957).

Similarly, we need not discuss at length respondents' contention that it was not responsible for what happened on January 2, 1960. But the respondents' contention is at complete variance with the allegations of the complaint that the January 2, 1960 strike was "authorized, instigated and encouraged" by the Union (Par. Eighth, R. 4). We submit that the courts cannot resolve the issues of fact raised by the complaint solely upon the Union's version of the incident as presented in its own affidavit.

As for the question of whether or not what happened on January 2, 1960 was a strike, we submit that that question is foreclosed by the wording of the no-strike clause here. That clause not only prohibits "strikes" but also "boycotts, interruption of work, stoppage, temporary walkout or lockout for any reason during the term of this contract" (R 8). Even if what happened was not a strike, it certainly was either an "interruption of work", a "stoppage" or a "temporary walkout"—all equally prohibited by the contract. Any argument that there was no strike is completely baseless in the light of the broad contractual prohibitions against any interference with normal production.

Thus this Court is left with the issues presented by petitioner in its main brief—whether or not a union's breach of a no-strike clause waives its right to arbitrate that breach and whether or not the breach of a no-strike clause is within the scope of the arbitration clause. All of respondents' attempts to change the issues are, we submit, completely unavailing.

II

The interests of industrial peace are best served by imposing the sanction of judicial redress against a breach of a no-strike clause.

In this term, this Court has on three different occasions restated that the basic purpose of Section 301 was the promotion of industrial peace. *Charles Dowd Box Co.* v. *Courtney* U. S. , 7 L. ed. 2d 483, 488 (1962); *Retail Clerks International Association* v. *Lion Dry Goods, Inc.* U. S. , 7 L. ed. 2d 503, 510 (1962); *Local 174* v. *Lucas Flour Co.* U. S. , 7 L. ed. 2d 593, 600 (1962). These cases reiterate the fundamental contention of petitioner's main brief that the issues in this case and all 301 cases must be viewed in light of "the basic policy of national labor legislation to promote the arbitral process as a substitute for economic welfare." *Local 174* v. *Lucas Flour*, *supra* at 600. In particular, the *Lucas Flour* case follows the authorities set forth at length in our main brief to the effect that a strike, even in the absence of a specific no-strike clause, is a breach of the arbitration clauses of a contract. The contentions of the New York State AFL-CIO that the no-strike clause and the grievance and arbitration clause are no more important than any other clause in the contract are completely rebutted by these recent cases and their predecessors.

Respondents in their brief contend that the emphasis on this point in petitioner's main brief is misplaced. Respondents argue that it is legally permissible for an employer to obtain from an arbitrator damages for the breach of a no-strike clause, and in the past some arbitrators have indeed awarded such damages. We may say

parenthetically that this is the only proposition for which *Matter of Publishers Association (New York Stereotypers)*, 8 N. Y. 2d 414 (1960) stands. But whether or not arbitrators can legally award damages, the questions remain whether or not an arbitrator is as likely to award damages as a court and whether or not the threat of arbitrating a breach of a no-strike clause provides a sufficient deterrent to prevent such a breach in the future. We submit that as set forth in petitioner's main brief, an arbitrator is just not likely to depart from his role as peacemaker and impose upon either party to a collective bargaining contract the sanctions which its conduct calls for. Instead, this role is best played by a court which can mete out the appropriate sanction without worrying about jeopardizing its continuing relationship as a peacemaker.

We submit that the considerations which make arbitration the most desirable way to settle the numerous questions which necessarily arise in the day to day operation of an industrial plant just are not applicable here. Ordinarily the arbitration processes help keep the industrial peace. But in a breach of the no strike clause situation, the industrial peace has already been broken and the issue is what can be done to prevent such abnormal situations in the future.

Respondent spends a great deal of time in discussing what would be best in the particular case at bar. We submit that the question is not what is the best way to dispose of breaches of a no-strike clause already in dispute, but rather what is the way to prevent future breaches. To this, we submit, that the prospect of having to face a court will deter far more breaches of no-strike clauses than will the prospect of having to face an arbitrator.

Respondent attempts to comfort petitioner by stating that in any event it can obtain "judicial redress" after the arbitration simply by moving to confirm the award of the arbitrator. But at that time it will have been too late. If prior state law is any criterion, the attacks on the award will be limited to a few exceptional situations. See New York Civil Practice Act, Sections 1458, 1461, 1462 and 1462-a. The merits of the arbitrator's award will not even be considered by a court. In the light of the legislative history and wording of section 301 as set forth in petitioner's main brief, we submit, that this is not what Congress had in mind when it passed Section 301.

CONCLUSION

For all the reasons set forth in the main brief and herein, the judgment of the Court of Appeals for the Second Circuit should be reversed, and this case remanded to the United States District Court for the Southern District of New York, for trial.

Respectfully submitted,

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